

**CERTIFIED FOR PUBLICATION**  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**SECOND APPELLATE DISTRICT**  
**DIVISION FIVE**

CHINESE YELLOW PAGES  
COMPANY,

Plaintiff and Appellant,

v.

CHINESE OVERSEAS MARKETING  
SERVICE CORPORATION,

Defendant and Respondent.

B197234

(Los Angeles County  
Super. Ct. No. BC270115)

ORDER MODIFYING OPINIONS  
AND DENYING REHEARING  
PETITION; ORDER DISSENTING  
FROM THE DENIAL OF THE  
REHEARING PETITION  
[NO CHANGE IN JUDGMENT]

1. On page 3 in the last sentence of the third paragraph, delete:

13

Insert in its place:

11

2. On page 3, delete the entire first sentence in the fourth paragraph.

In its place, insert:

On January 13, 2006, two days after the date of the last payment by Mr. Kao to Ms. Chen, the debtor filed a voluntary chapter 11 bankruptcy petition.

3. On page 6, in the first sentence of the last paragraph, delete:

debtor

Insert in its place:

creditor

4. On page 7, in the sixth line of the first full paragraph, delete:

9

Insert in its place:

8

5. On page 12, in the fourth line from the bottom of the page, delete:

should

Insert in its place:

would

6. On the first line of page 13, delete:

January

In its place, insert:

February

7. In the fourth line from the bottom of the page 13, before the word:

order

Insert:

February 22, 2007

8. On the ninth line from the bottom of page 17, delete:

though

9. On page 23, in the first sentence of the second paragraph, delete:

creditor's

In its place, insert:

debtor's

10. At the top of page 25, above the disposition, insert:

Fourth, for the first time in the rehearing petition, the debtor asserts because we reversed the contract breach cause of action in the prior appeal, no attorney fees are recoverable pursuant to section 685.040. As noted, the present lawsuit arises out of an

alleged breach of the October 27, 2000 settlement agreement filed by the debtor. The October 27, 2000 settlement agreement of the debtor's lawsuit contains an attorney fee clause. In the present suit, the creditor sought attorney fees. When judgment was ultimately entered in the present case, it contained an attorney fee award pursuant to Civil Code section 1717. The trial court granted the creditor's attorney fee motion on April 13, 2006. On August 21, 2007, we affirmed the judgment in all respects, including the Civil Code section 1717 attorney fee award, except as to the finding of a contract breach.

*(Chinese Yellow Pages v. Chinese Overseas Marketing Service Corporation, supra.)*

The debtor's review petition was denied by our Supreme Court. That judgment, which includes the Civil Code section 1717 attorney fee award, is final for all purposes. *(North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 769 [once the review petition is denied by our Supreme Court, "the judgment of the trial court is final for all purposes"]; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 838, pp. 902-903.)

Some or all of the fees incurred during the bankruptcy proceedings, the amount we leave to the trial court to determine, were sustained enforcing the judgment which contains a Civil Code section 1717 attorney fee award which has been affirmed. None of the fees were incurred after we reversed the contract breach cause of action on August 21, 2007.

*(Chinese Yellow Pages v. Chinese Overseas Marketing Service Corporation, supra.)*

As noted, section 685.040 expressly states a judgment creditor may recover reasonable and necessary attorney's fees incurred in enforcing a judgment. But an essential element specified in section 685.040 of recoverable reasonable and necessary fees is that the underlying judgment *must* include an award of attorney's fees pursuant to section 1033.5, subdivision (a)(10)(A). Section 1033.5, subdivision (a)(10)(A) permits the recovery of Civil Code section 1717 contractual attorney fees. *(Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 126 ["Section 1033.5 provides that attorney fees are allowable as costs under section 1032 when authorized by contract, statute, or law, including Civil Code section 1717."]; *Torres v. City of San Diego* (2007) 154 Cal.App.4th 1526, 1530.) The now final judgment in this case expressly includes an

award of attorney fees pursuant to 1033.5, subdivision (a)(10)(A) and Civil Code section 1717. Thus, section 685.040 applies and the trial court, upon remittitur issuance, must proceed to exercise its discretion and fix the amount of recoverable reasonable and necessary attorney fees.

The rehearing petition is denied.

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TURNER, P.J.

KRIEGLER, J.

ARMSTRONG, J.  
B197234

**CERTIFIED FOR PUBLICATION**

My dissenting opinion filed herein on December 30, 2008, is modified as follows:

1. The date of “August 27, 2007,” on page 2 is stricken and the date of “August 21, 2007,” is substituted in its place.

2. On page 1, insert the following language between the words “the parties’ contract.” and the word “Thus,” in the third paragraph:

“Because Overseas is the prevailing party on the breach of contract cause of action, it should be awarded attorney fees and costs on that cause of action. (Civ. Code, § 1717, subd. (b)(1).)”

3. On page 4, insert the following language after the words “section 685.040.” on line 10:

“However, this does not mean that an award of attorney fees to the party prevailing stands after a reversal of the judgment. ‘An order awarding costs falls with a reversal of the judgment on which it is based.’ [Citations.] ‘[T]he successful party is never required to pay the costs incurred by the unsuccessful party.’ [Citation.] After reversal of a judgment, ‘the matter of trial costs [is] set at large.’ [Citation.] Although we cannot reverse the order granting costs and fees, the trial court should do so on remand.” (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.)

4. On page 4, above the signature, insert the following words:

“Therefore, I would grant the petition for rehearing and affirm the order denying the motion for attorney fees and granting the motion to tax costs and award Overseas Marketing Service Corporation its costs on appeal.”

ARMSTRONG, J.